# APPELLATE CIVIL.

*Before Mr. Justice McDonell and Mr. Justice Beverley.*

JANAKI BALLAV SEN (ONE OF THE DEFENDANTS) *v.* HAFIZ MAHOMED ALI KHAN AND OTHERS (PLAINTIFFS) AND ANOTHER (DEFENDANT.)*

1886 *March* 23.

*Certificate of Administration—Act XXVII of* 1860—*Right to recover debts of deceased person.*

Where payment of a debt is not being withheld for fraudulent or vexatious motives, but from a reasonable doubt as to the party entitled to it, the person desirous of recovering the amount of the debt is bound to produce a certificate under Act XXVII of 1860 before he can obtain a decree, or execute a decree already obtained by the deceased; though he may institute his suit, or apply for execution without such certificate, provided a certificate is filed before decree or before execution issues.

THE facts of this case, as far as they are material to this report, were as follows:—

On 9th Aghran 1277 (23rd November 1870), defendant No. 2 executed in favor of his father-in-law, one Sadat Ali Khan Saheb, a mortgage bond for Rs. 30,000 to be repaid without interest in ten yearly instalments of Rs. 3,000 each. In default of payment interest was to run at the rate of 1 per cent. per mensem till realization. Payments were to be made by hundis, and to be entered on the back of the bond.

On 10th Aghran 1277 (24th November 1870), *i.e.*, on the following day, an ijara lease of the mortgaged properties was executed by defendant No. 2 in favor of Sadat Ali at an annual rent of Rs. 3,000, payable in two instalments of Rs. 1,500 each, and on 11th Aghran 1277 (25th November 1870), a dur-ijara of the same properties was granted by Sadat Ali to Ram Nath Singh at an annual rent of Rs. 3,600, payable in two instalments of Rs. 1,800 each. It was admitted that Ram Nath Singh was in reality the servant and benamidar of defendant No. 2.

On 24th Assar 1286 (17th June 1879), defendant No. 2 executed a second mortgage of the same properties (together with other

* Appeal from Original Decree No. 97 of 1885, against a decree of Baboo Nobin Chunder Ganguli, Rai Bahadoor, Subordinate Judge of Rungpore, dated the 29th of December 1884.

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properties) in favor of defendant No. 1, who, having obtained a decree upon his bond, brought the properties to sale, and himself purchased them.

The present suit was brought by the heirs of Sadat Ali Khan upon the bond of 9th Aghran 1277 for the sum of Rs. 30,000 as principal, and Rs. 24,600 as interest, on the allegation that nothing whatever had been paid.

Defendant No. 2 admitted the execution of the bond, and that he had not paid anything in liquidation thereof. Defendant No. 1, the second mortgagee and auction-purchaser of the mortgaged properties, pleaded that the first mortgage had been liquidated by the execution of the ijara and dur-ijara, which substituted an annual payment of Rs. 3,600 for ten years, in lieu of principal and interest, and that such payments had in fact been made. He also objected that the plaintiffs were not the sole heirs of Sadat Ali, and that they had not obtained a certificate under Act XXVII of 1860 empowering them to realize the debts due to the estate of the deceased.

The Subordinate Judge who tried the suit found that the plaintiffs were bound either to produce a certificate under Act XXVII of 1860, or to show that they were the only heirs, and that they had not done so. On the merits he came to the conclusion that nothing had been paid upon the bond, and he, therefore, gave the plaintiffs a decree for their entire claim, to be realized in the first instance by the sale of the mortgaged properties, and in the event of the sale proceeds of such properties being insufficient, by the sale of other properties belonging to defendant No. 2. But coupled with his decree was an order directing that the plaintiffs should not be entitled to execute it unless and until they produced a certificate under Act XXVII of 1860.

From this decision the first defendant appealed.

Mr. *Evans*, Baboo *Mohini Mohun Roy*, Baboo *Guru Das Banerjee*, and Baboo *Mokoond Nath Roy*, for the appellant.

Mr. *Woodroffe*, Baboo *Srinath Das*, and Baboo *Jogesh Chandra Roy*, for the respondents.

The judgment of the Court (McDONELL and BEVERLEY, JJ.) so far as is material to this report, continued (after stating the facts as above) as follows :—

Now the first point taken in appeal is that this order of the lower Court is wrong. It is contended that under s. 2 of Act XXVII of 1860, no decree should have been made without production of a certificate, especially as the plaintiffs had failed to establish that they were the sole heirs of Sadat Ali.

In making the order referred to the Subordinate Judge has relied on the case of *Luchmin* v. *Gunga Pershad* (1), but that decision only goes so far as to lay down that in certain exceptional cases, provided for by the Statute, a suit may be instituted and decreed without the production of a certificate. In the case of *Hati Lall* v. *Hurdeo* (2), it was similarly held that a certificate was not imperatively necessary in every case before the execution of a decree could be taken out, but that when the judgment-debtor objects to the title of the person claiming to execute the decree, the Court should consider whether the objection is *bonâ fide* or vexatious. It is not alleged that in the present case payment is being withheld from fraudulent or vexatious motives. In the case of *Tarini Pershad Ghose* v. *Gungadhur* (3), it was held that the production of a certificate was necessary before a decree in favor of a deceased person could be executed by a person claiming to be his heir. In the case of *Shodone Mohaldar* v. *Halalkhore Mohaldar* (4), the guardian of a minor sued to recover upon a bond which he alleged had been devised to the minor by the deceased, and it was held that such a suit would not lie unless probate of the will were taken out, or unless the guardian had obtained a certificate under Act XXVII of 1860. In that case it was distinctly held that the Subordinate Judge was wrong in making a decree, such as has been made in this case, that is to say, a decree coupled with a condition that it shall not be executed without the production of a certificate.

In *Chunder Coomar Roy* v. *Gocool Chunder Bhuttacharjee* (5), a similar view was held, though an expression of opinion was at the same time thrown out, that possibly a suit might be instituted before a certificate was actually obtained, if such certificate was subsequently produced at the trial.

(1) I. L. R., 4 All., 485.
(2) I. L. R., 5 All., 212.
(3) 6 W. R. Mis., 34.
(4) I. L. R., 4 Calc., 645.
(5) I. L. R., 6 Calc., 370.

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Rulings to this effect are to be found in *Ramakristna Moodelly* v. *Soobraya Gramany* (1) and *Govind Appah* v. *Kondappah Sastrulu* (2).

The result of these decisions, we think, is that where payment of a debt is not being withheld for fraudulent or vexatious motives, but from a reasonable doubt as to the party entitled, the plaintiff is bound to produce a certificate under Act XXVII of 1860 before he can obtain a decree or execute a decree already obtained by the deceased, though he may institute his suit or apply for execution without such a certificate provided it is filed before decree or before execution issues.

In the present case, then, the order of the lower Court would appear to be technically wrong; but we should not be prepared to set the decree aside, or dismiss the suit on this ground alone.

[The decree of the Subordinate Judge was eventually set aside on the merits of the case, and on this ground, and the case remanded for further enquiry.]

J. V. W. *Case remanded.*

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*Before Mr. Justice Norris and Mr. Justice Beverley.*

1886 *April* 15.

DOMA SAHU (PLAINTIFF) *v.* NATHAI KHAN AND OTHERS (DEFENDANTS.)*

*Mortgage—Foreclosure—Notice of foreclosure—Reg. XVII of* 1806.

A notice of foreclosure signed by the Sherishtadar of the Judge's Court and bearing the seal of the Court, but not the signature of the Judge, *held*, following the principle of the decision in *Basdeo Singh* v. *Mata Din* (1), not to be a valid notice under Reg. XVII of 1806, s. 8.

THE material facts of this case were as follows:—

Certain properties, which were set out in the first paragraph of the plaint, were mortgaged by the father of the defendant No. 1 to the plaintiff, to secure a sum of Rs. 7,635 under a deed of conditional sale, dated the 17th December 1875, corresponding with the 3rd of Pous 1282. In the deed of conditional sale the term for repayment of the amount was fixed at two years.

* Appeal from Original Decree No. 22 of 1885, against the decree of Baboo Girish Chandra Chaterji, Rai Bahadur, Subordinate Judge of Mozufferpore, dated the 27th of December 1884.

(1) 6 Mad. Jur., 262.

(2) 6 Mad. H. C., 131.